FILED
SEP 26 1982
ALEXANDER L. STEVAS

No. 81-2402

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNDETERMINED QUANTITIES OF VARIOUS ARTICLES OF DRUG . . . EQUIDANTIN . . ., PERFORMANCE PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Performance Products, Inc. (Performance) manufactures the animal drug Equidantin (Pet. App. A2), which is labeled for use in the treatment of two equine ailments (*ibid.*). Although Equidantin has been marketed by Performance since 1970, there is no new animal drug application (NADA) for Equidantin approved by the Food and Drug Administration (FDA). Nor was there at the time of Equidantin's manufacture an investigational new animal drug exemption (INAD) on file with FDA permitting its investigational use (*id.* at A6, A21; see 21 U.S.C. 360b(b) and (j)). It is through the approval of a NADA by the FDA that a veterinary drug that is not generally recognized by experts as safe and effective for its intended uses can be marketed (Pet. App. A5-A6). In fact, there have been no well-controlled clinical studies that establish that Equidantin is safe and effective for its labeled uses (Pet. App. A15).

Equidantin contains one active ingredient, nitrofurantoin, which is also the active ingredient of the FDA-approved product Dantafur (*id.* at A2).[1]

2. In July 1979, the government filed a complaint seeking, *inter alia*, seizure and condemnation of quantities of Equidantin on the ground that it was a new animal drug, 21 U.S.C. 321(w), that lacked FDA approval (21 U.S.C. 360b(b)), and thus was unsafe within the meaning of 21 U.S.C. 360b(a)(1)(A) (*id.* at A-6). As an unsafe new animal drug, Equidantin was adulterated, as a matter of law, 21 U.S.C. 351(a)(5), and, accordingly, subject to seizure and condemnation, 21 U.S.C. 334(a)(1) (*id.* at A4-A5). Petitioner intervened in the seizure action as claimant and contended that Equidantin was not a new animal drug.

Following a bench trial, the district court found that Equidantin was not generally recognized among qualified experts as safe and effective for its labeled uses (Pet. App. A22, A24), see 21 U.S.C. 321(w)(1), and thus concluded that Equidantin was an unapproved new animal drug (Pet. App. A24). The court also found that Equidantin would not be exempt from the NADA procedures even if Dantafur were generally recognized as safe and effective (*id.* at A23). The seized items were condemned but destruction was stayed pending appeal (*id.* at A7).

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[1]Dantafur is labeled for the same two uses in horses as Equidantin (see *id.* at A2, A11). Unlike Equidantin, however, Dantafur was reviewed by the National Academy of Sciences/National Research Counsel as part of the Drug Efficacy Study Implementation (DESI) review following the 1962 amendments to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, Pub. L. No. 87-781, 76 Stat. 780, and found "probably effective." Pet. App. A11; 35 Fed. Reg. 12792 (1970). FDA approved a supplemental NADA for Dantafur in 1977. Pet. App. A11; 42 Fed. Reg. 19143 (1977), codified in 21 C.F.R. 520.1560 and 520.1560a (1981). While a dosage unit of Equidantin and Dantafur contain the same quantity of nitrofurantoin, the two drug products have different inactive ingredients. Pet. App. A2.

The court of appeals unanimously affirmed (Pet. App. A17). After a careful review of the record, the court found that neither Equidantin nor its active ingredient, nitrofurantoin, was generally recognized among qualified experts as safe and effective for its intended uses (*id.* at A15, A17).[2] The court rejected Performance's argument that prior FDA approval of Dantafur exempted Equidantin from new animal drug status, noting that petitioner had wrongly confused "agency recognition of actual safety and effectiveness [by approval of the Dantafur NADA], * * * with general recognition in the scientific community of safety and effectiveness" (*id.* at A16).

In addition, the court expressly concluded (Pet. App. A17) that the record in this case presented no occasion for deciding whether the term "drug" in 21 U.S.C. 321(w) refers to a drug product or only to its active ingredient.[3] Because neither the product nor the active ingredient is generally recognized by experts as safe and effective, Equidantin remains subject to condemnation as an unapproved new animal drug no matter how that legal issue is resolved.

3. The decision of the court of appeals is correct. It does not conflict with a decision of any other court of appeals and does not raise any issue warranting review by this Court. Petitioner contends that the court below rejected the analysis of the court of appeals in *Generix*, and "implicitly adopted" the view "that bioavailability is an attribute of a 'new animal drug' by its acceptance of and reliance upon the

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[2]The court observed that "[n]one of [petitioner's] witnesses" had testified to the contrary (Pet. App. A15).

[3]This is an issue on which the courts of appeals, in the context of new human drugs, are in conflict. Compare *Premo Pharmaceutical Laboratories, Inc.* v. *United States*, 629 F. 2d 795 (2d Cir. 1980), with *United States* v. *Generix Drug Corp.*, 654 F. 2d 1114 (5th Cir. 1981), cert. granted, No. 81-1222 (Mar. 1, 1982) ("*Generix*").

expert testimony presented by the Government" (Pet. 6). But, because of the factual record below, this case does not present the same legal issue that is before this Court in *Generix*. Moreover, petitioner's argument ignores the rationale of the court below.

Respondents in the *Generix* case contend that their "products do not require premarket clearance because their active ingredients are generally recognized as safe and effective" (Resp. Br. 11).[4] Their merits brief expressly disclaims reliance on the fact that FDA has approved new drug applications for other drug products containing the same active ingredients as their products (*ibid.*).

Unlike respondents in *Generix*, petitioner in this case cannot argue that its drug is exempted from premarketing clearance because its active ingredient, nitrofurantoin, is generally recognized as safe and effective. The court of appeals found, and the record below establishes, to the contrary, that nitrofurantoin is not generally recognized by experts as safe and effective (Pet. App. A16-A17). Thus, the court of appeals reasoned that, even if, as respondents contend in *Generix* (Resp. Br. 13), "the statutory definition of new [animal] drug refers only to the active ingredient, Equidantin would not be exempt from new [animal] drug status because its active ingredient, nitrofurantoin, is not generally recognized among qualified experts as safe and effective and is therefore a 'new [animal] drug' " (Pet. App. A17). Accordingly, however *Generix* is decided, Equidantin will remain subject to condemnation.

Petitioner contends that the courts below erred by relying on bioavailability data which, it argues, are irrelevant in determining whether a drug is a "new animal drug" (Pet.

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[4] "Resp. Br." refers to the brief for the respondents in *United States* v. *Generix Drug Corporation*, No. 81-1222.

6-8).[5] This contention is not supported by the record. Although the court of appeals summarized all the expert testimony on both sides (Pet. App. A14-A15), it did not rely on the testimony of the government's bioavailability expert. Rather the court's ruling is amply supported by expert testimony based not on bioavailability considerations but on the fact that there are no well controlled studies in horses showing that either nitrofurantoin generally, or Equidantin specifically, is effective in treating the indicated diseases (Pet. App. A14-A15; Tr. 28-31, 34, 36; Booth Dep. 33, 41).[6]

The court of appeals' reliance on this expert opinion accords with the approach that this Court and others have taken in determining whether a drug is generally recognized by qualified experts as safe and effective. For there to be "general recognition" of a drug, there must be, among other things, well-controlled investigations reported in the scientific literature demonstrating the drug's safety and effectiveness for its intended uses. See, *e.g.*, *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973); *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 629-630, 632 (1973); *United States* v. *41 Cases, More or Less . . . Naremco, Inc.*, 420 F. 2d 1126, 1130 (5th Cir. 1970). Since there are no reliable studies in the scientific literature concerning the use in horses of either nitrofurantoin or Equidantin, the court of appeals correctly concluded

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[5]Petitioner does not challenge the court of appeals' determination that FDA approval of Dantafur, by itself, does not confer general recognition of safety and effectiveness on either its active ingredient, nitrofurantoin, Dantafur itself, or Equidantin. This holding is consistent with prior decisions of this Court (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973); *USV Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 664 (1973)).

[6]"Tr." refers to the transcript of the district court proceedings. "Booth Dep." refers to the deposition of Dr. Nicholas Booth, introduced into evidence at the trial. Tr. 3.

that these drugs cannot be generally recognized as safe and effective. There is no need for this Court to review a factual determination that is of importance only in this particular case. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n.7 (1979).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982